INDEX

OPINIONS BELOW 2

JURISDICTION 3

THE QUESTIONS PRESENTED 3

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 4

STATEMENT OF THE CASE 6

REASONS FOR GRANTING THE WRIT 9

CONCLUSION 22

CERTIFICATE 23

APPENDIX A & B
Opinion of the Supreme Court of the State of Louisiana

APPENDIX C & D
Earlier Rulings by the Louisiana Supreme Court

APPENDIX E, F, G & H
Opinions of the Second Circuit Court of Appeals

APPENDIX I, J, K & L
Opinions of the Trial Judge and Judgments Imposing Sentence

APPENDIX M & N
Orders Staying Sentence

APPENDIX O
Order of Supreme Court Justice Lewis F. Powell, Jr. Extending Time for Filing Petition for Writ of Certiorari

TABLE OF AUTHORITIES

Constitutions

Sixth Amendment to the Constitution of U.S. 5

Fourteenth Amendment to the Constitution of U.S. 4

Louisiana State Constitution .....

Louisiana Statutes

R.S. 37:1261 ..... 14, 16

R.S. 37:1269 ..... 21, 22

R.S. 37:1270 ..... 16, 20

R.S. 37:1273 14

R.S. 37:1286 ..... 5, 14

R.S. 37:1289 16

R.S. 13:4611 ..... 6, 17

Cases

Bloom v. Illinois, 391 U.S. 194, 88 S. 1481 ..... 10, 17

Brookhart v. Janis, 384 U.S. 1, 3, 86 S. Ct. 1245, 1246, 16 L. Ed. 2d 314 (1966) 16

Duncan v. Louisiana, 391 U.S. 145, 88 S. Ct. 1444 (1968) 17

Dyke v. Taylor Implement Manufacturing Company, 391 U.S. 215, 88 S. Ct. 1472 (1968) 17

Garner v. State of Louisiana, 368 U.S. 158, 82 S. Ct. 248 (1961) 11

Moity v. Mahfouz, 137 So. 2d, 513 (3rd Cir. 1961) 10

Perrault v. Edwards, 1970 La. 671, 129 So. 125 (1930) 10

Pizzolato v. Cataldo, 202 La. 675, 12 So. 2d. 677, 679 (1943) 10

Pointer v. State of Texas, 380 U.S. 400, 403, 85 S. Ct. 1065, 1086, 13 L. Ed. 2d 923 (1965) 15

Roussel v. Railways Realty Company, 133 La. 153, 63 So. 608 (1913) 10

Roy v. Berard, 227 La. 86, 78 So. 2d 519 (1955) 12

State v. Cronin, 220 La. 244, 56 So. 2d 246 (1951) 11

State v. Gatlin, 241 La. 321, 129 So. 2d 4 (1961) 12

State v. Harrell, 232 La. 35, 93 So. 2d 684 12

State v. Laborde, 234 La. 28, 99 So. 2d 11 (1958) 12

Thompson v. City of Louisville, 362 U.S. 199, 80 S. Ct. 624 (1960) 12

Thornton v. Thornton, 234 La. 108, 99 So. 2d 43 (1958) 12

Wall v. Wall, 225 So. 2d 47 (1st Cir. 1969) 11

Miscellaneous Others

17 C.J.S., Section 39, Page 103 20

43 C.J.S., Injunction, Second 266 at Page 1026 19

28 U.S. Code Sec. 1257 (3) 3

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 197....

No. .....

LOUISIANA STATE BOARD OF MEDICAL EXAMINERS
Plaintiff

versus

B. D. MOORING
Defendant-Petitioner

and

LOUISIANA STATE BOARD OF MEDICAL EXAMINERS
Plaintiff

versus

E. J. NOSSER
Defendant-Petitioner

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

B. D. Mooring and E. J. Nosser, your petitioners, pray that a writ of certiorari issue to review the judgment and decision of the Supreme Court of the State of Louisiana which affirmed convictions of your petitioners of the offense of contempt of Court in the First Judicial District Court, Caddo Parish, Louisiana.

OPINIONS BELOW

SUPREME COURT OF LOUISIANA. The opinions of the Louisiana Supreme Court bears the style and citation as follows: *Louisiana State Board of Medical Examiners versus B. D. Mooring*, La. 288 So. 2nd 355 (1974) *Louisiana State Board of Medical Examiners versus E. J. Nosser*, La. 288 So. 2nd 355 (1974). Copies of these opinions are appended to this petition and made part hereof. (See Appendix A & B). Copies of two earlier rulings by the Louisiana Supreme Court found at 282 So. 2nd 525 and 526 are also appended to this petition. (See Appendix C & D).

COURT OF APPEAL, SECOND CIRCUIT, STATE OF LOUISIANA. The opinions of the Court of Appeal, Second Circuit, bear docket numbers 12,253, 12,252, 12,-201, and 12,200. (Copies of these said opinions are appended to this motion and made part hereof. (See Appendix E, F, G & H).

FIRST JUDICIAL DISTRICT COURT, CADDO PARISH, LOUISIANA. There is attached to this motion the opinion of the trial Judge and Judgment imposing sentence in the case of *Louisiana State Board of Medical Examiners versus B. D. Mooring*, Number 122,682 of that Court. (See Appendix I & J). There is attached to this motion the opinion of the trial Judge and Judgment imposing sentence in the case of *Louisiana State Board of Medical Examiners versus E. J. Nosser*, Number 132,517 of that Court. (See Appendix K & L).

JURISDICTION

The judgments and opinions of the Louisiana Supreme Court below (See Appendix A & B), were entered on January 25, 1974. In the trial Court the execution of the sentences were stayed in order to allow movers to apply for Writs to the United States Supreme Court. The stay was for a period of ninety (90) days and was granted on February 13, 1974. (See Appendix M & N). On April 25, 1974, United States Supreme Court Justice Lewis F. Powell, Jr., signed an order extending the time for filing the petition for Writ of Certiorari to and including May 9, 1974. (See Appendix O). The jurisdiction of this Court is invoked under the provisions of 28 U.S. Code Sec. 1257 (3).

THE QUESTIONS PRESENTED

1. Whether all essential elements in the criminal contempt prosecution must be proven by evidence legally admitted; more particularly, whether defendants are deprived of constitutional right to confrontation and cross examination where essential element is sought to be proved solely by affidavit or certificate of non-testifying persons.

2. Whether contempt of court is, under Federal and Louisiana Jurisprudence, in the nature of a criminal prosecution and whether, because of the *quasi criminal* character of contempt proceedings, the burden is upon the moving party to prove all of the supporting and essential elements of contempt of court.

3. (a) Whether contempt of court proceedings are regarded, not as ancillary or incidental to the suit out

of which they arise, but are instead independent proceedings, and (b) Whether the evidence offered at the trials of these contempt proceedings is sufficient to sustain the judgment finding defendants in contempt of court under due process of law.

4. Whether the charges against defendants were so totally devoid of any evidentiary support as to an essential element as to render their conviction unconstitutional under the due process clause of the Fourteenth Amendment.

5. Whether defendants in rule for contempt of court are charged with serious misdemeanor and entitled to trial by jury and/or whether defendants in rule have vested constitutional right to trial by jury because of prior rulings of court on pending contempt rules.

6. Whether actions of complainant in procuring, acquiescing or aiding and abetting in the commission of a violation of an injunction is bar to plaintiff's enforcement of contempt proceedings under (a) the general law, (b) the "clean hands" doctrine, (c) the Louisiana Law of Principles, (d) under the doctrine of *pari delicto*, or (e) due process of law.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment, Section 1, United States Constitution.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens

of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sixth Amendment, United States Constitution.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

West's Louisiana Revised Statutes, Title 37, Section 1286.

The board through its proper officer may cause to issue in any competent court a writ of injunction enjoining any person from practising medicine in any of its departments, until such person obtains a certificate under the provisions of this Part. This injunction shall not be subject to being released upon bond.

In the suit for an injunction, the board, through its president, may demand of the defendant a penalty of not more than one hundred dollars, and attorney's fees not to exceed fifty dollars, besides the costs of court. This judgment for penalty, attorney's fees, and costs may be rendered in the same judgment in which the injunction is made absolute.

The trial of the proceeding by injunction shall by summary and by the judge without a jury.

West's Louisiana Revised Statutes, Title 13, Section 4611, (A) and (2).

Except as otherwise provided for by law:

(A) The supreme court, the courts of appeal, the district courts, family courts and city courts may punish a person adjudged guilty of contempt of court therein, as follows:

* * *

(2) For disobeying or resisting a lawful restraining order, or preliminary or permanent injunction, by a fine of not more than five hundred dollars, or by imprisonment for not more than six months or both . . .
Amended by Acts 1972, No. 664, 1.

STATEMENT OF THE CASE

The State Board of Medical Examiners filed Rules to Show Cause alleging that defendants, B. D. Mooring and E. J. Nosser disregarded injunctions wherein the defendants, B. D. Mooring and E. J. Nosser were enjoined from in any manner practicing medicine in any of its departments in the State of Louisiana. To these rules defendants filed Exceptions of Lis Pendens. Defendants also filed Motions for Trial by Jury.

In the Exceptions of Lis Pendens, defendants showed that between the same parties there were pending rules for contempt which had neither been dismissed nor tried despite responsive pleadings having been filed thereto.

In essence defendants urged that they were being vexed twice for the same offense and being deprived of earlier favorable rulings obtained in a still pending contempt proceedings. In the Exceptions of No Cause of Action, defendants contended that the Rule to Show Cause did not **affirmatively** allege that the judgment or injunction referred to therein is "lawful"; that the word "lawful" is only descriptively used in Paragraphs of the said Rule to Show Cause but does not therein appear as an affirmative allegation.

In their Motions for Trial by Jury, defendants contended that they were charged with contempt of court, a serious misdemeanor criminal offense under the laws of the State of Louisiana and Constitutional Provisions of the United States. Further, defendants contended that they had a vested constitutional right to trial by jury for several reasons, among others, that the alleged injunction, if it were rendered, was rendered at a time that defendants would be entitled to trial by jury; and further, in the very suits the Court had heretofore ordered that defendants be accorded trial by jury on Rules to Show Cause why they should not be held in contempt which were still pending and pertains to the injunctions alleged in the present rules.

After hearing arguments of counsel for plaintiff and counsel for defendants, the Court over-ruled all of the defendants exceptions and denied their motions for jury trial.

During the Judge trials which followed, no evidence was offered to show the basis upon which the injunctions

were issued, no evidence was offered to show that defendants were not licensed to practice medicine in the State of Louisiana except by affidavits objected to by defendants on the grounds of lack of confrontation and cross examination. Further, the evidence affirmatively showed that any conduct of the defendants was procured by plaintiff or agents acting in behalf of plaintiff. Finally, the evidence failed to show that the proceedings against the defendants were lawfully instituted by an attorney for the Louisiana State Board of Medical Examiners.

At the conclusion of the trials, the matter was taken under advisement, defendants submitted legal memorandum and the Court in its Opinions found defendants guilty of contempt of Court. Notices of intention to apply to the Second Circuit Court of Appeal and to Louisiana Supreme Court for Certiorari were given to the Trial Judge and opposing counsel. The Second Circuit Court of Appeal denied the applications for Writ of Certiorari which were timely filed on the belief that it was without jurisdiction. Thereafter timely applications were made for Writ of Certiorari, prohibition and mandamus in the Louisiana Supreme Court in Docket Number 53,909 and 53,910, in which the Honorable Court ruled as follows:

> "Application not considered. There is no final judgment or sentence and we will not review a case so postured."

The Trial Judge then sentenced defendant B. D. Mooring to pay a fine of $500.00 or be imprisoned for thirty days **and additionally** to be imprisoned for thirty days. The Trial Judge sentenced defendant E. J. Nosser

to pay a fine of $500.00 or to be imprisoned for thirty days **and additionally** to be imprisoned for fifteen days. Notices of intention to apply to the Second Circuit Court of Appeal and to the Louisiana Supreme Court was again given to the Trial Judge and to opposing counsel. Timely applications were made to the Second Circuit Court of Appeal and although the Second Circuit Court of Appeal had on its first Writ Application denied that it had jurisdiction, the said Court now held it had jurisdiction but denied Writs on November 20, 1973. Timely applications were made for Writ of Certiorari, prohibition and mandamus in the Louisiana Supreme Court which, in affirming the Trial Court ruled as follows:

> "Writ denied. Under the allegations made, no error of law or fact is shown in this contempt proceeding."

Justice Dixon dissented and was of the opinion that Writs should be granted.

Notice was given to opposing counsel, Louisiana Supreme Court, and of the Trial Judge of defendants intention to apply to the United States Supreme Court for Writs of Certiorari, prohibition and mandamus. On February 13, 1974, the Trial Judge issued a stay for a period of ninety (90) days for the purpose of making this Writ Application.

REASONS FOR GRANTING THE WRIT

Contempt of Court Is a Criminal Proceeding

It has long been acknowledged under the Louisiana Jurisprudence that a rule for contempt is in the nature of

a criminal prosecution. See *Pizzolato v. Cataldo*, 202 La. 675, 12 So.2d 677, 679 (1943); *Perrault v. Edwards*, 170 La. 671, 129 So.2d 125 (1930); *Roussel v. Railways Realty Company*, 133 La. 153, 63 So. 608 (1913). Additionally, a contempt of court proceeding is not regarded as ancillary or incidental to the suit out of which it arises but is regarded instead as an independent proceeding. *Moity v. Mahfouz*, 137 So.2d 513 (3rd Cir. 1961).

In *Bloom v. Illinois*, 391 U.S. 194, 88 S. 1481, criminal contempt is defined by the United States Supreme Court as follows:

> "Criminal contempt is a crime in the ordinary sense; it is a violation of law, of public wrong which is punishable by fine or imprisonment or both. In the words of Mr. Justice Holmes: 'These contempts are infractions of the law, visited with punishment as such. If such acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech'. (Citations omitted).
>
> 'Criminally contemptuous conduct may violate other provisions of the criminal law; but even when this is not the case convictions for criminal contempt are **indistinguishable from ordinary criminal convictions, for their impact on the individual defendant is the same.** Indeed, the role of criminal contempt and that of many ordinary criminal laws seem identical—protections of the institution of our Government and enforcement of their mandates."

Burden of Proof

Where a record is barren of any evidence tending to show one of the essential elements of contempt or of the

conviction, the United States Supreme Court, in *Thompson v. City of Louisville* said:

> "The ultimate question presented to us is whether the charges against petitioner were so totally devoid of any evidentiary support as to render his conviction unconstitutional under the due process clause of the Fourteenth Amendment. Decision of this question turns not on the sufficiency of the evidence, but on whether this conviction rests upon any evidence at all.
>
> * * *
>
> "Thus, we find no evidence whatever in the record to support these convictions. Just as 'conviction upon a charge not made would be sheer denial of due process' so it is a violation of due process to convict and punish a man without evidence of his guilt."

The Courts of Louisiana have long recognized that where there is a total absence of evidence to support a conviction, a question of law is involved and it is the duty of the Court to reverse the conviction. *State v. Laborde*, 234 La. 28, 99 So.2d 11 (1958), *State v. Harrell*, 232 La. 35, 93 So.2d 684, *State v. Gatlin*, 241 La. 321, 129 So.2d 4 (1961).

Contempt Rule Must Be Based on Valid Injunction

Laws governing contempt do not contemplate technical contempt, and must be construed strictly as to actual contempt, by union of act and intention to disobey orders of court. *Roy v. Berard*, 227 La. 86, 78 So.2d 519 (1955). A rule for contempt falls on determination that the judgment on which it is based is null. *Thornton v. Thornton*, 234 La. 108, 99 So.2d 43 (1958). Article 224

supporting facts necessary to such a finding, an adjudiciation of contempt will not be sustained. *State v. Cronin*, 220 La. 244, 56 So.2d 246 (1951). Thus, the burden of proof is on the moving party to **allege** and **prove** all of the supporting facts and essential elements of contempt of court. In *Wall v. Wall*, 225 So.2d 47 (1st Cir. 1969), it was held that:

> "The conviction of contempt of court subjects the offender to a fine, imprisonment or both. L.R.S. 13:4611. The proceeding by its very nature is **quasi criminal** and it is for this reason that objection should be viewed carefully, not with a thought to being hypertechnical, but for the purpose of assuring that the party charged is reasonably appraised of each and every facet of the matter which could ultimately lead to a fine or imprisonment . . . It is not what is in the mind of the offender that is controlling but it is what is alleged in the motion and **proved at the trial** that gives validity to a judgment of contempt."

Defendants' position is that a corpus delicti had not been proved, and therefore, the Court had a mandatory duty to acquit them. It is submitted that we are here concerned, as was the United States Supreme Court in the case of *Garner v. State of Louisiana*, 368 U.S. 158, 82 S.Ct. 248 (1961), not with a question of a sufficiency of evidence to support a conviction, but instead with a question of whether the convictions rest upon any evidence which would support a finding of guilt. Thus it is submitted that as a matter of due process under Article 1, Section 2 of the Louisiana Constitution and the Fourteenth Amendment of the United States Constitution, the convictions can not stand. In reaching a similar result, a case where the record had no evidence to support a

of the Louisiana Code of Criminal Procedure relative to defining constructive contempt includes willful disobedience of any **lawful** judgment, order, mandate, writ, or process of Court. Thus an essential element of the allegations of a petition or motion for rule in a contempt proceeding is an allegation that the said judgment or injunction was, in fact, a "lawful" judgment or injunction. Similarily, part of the proof required to be adduced at the trial is that there was, in fact, a judgment or injunction and that it was, in fact, a lawful judgment or injunction.

Failure of Plaintiff to Meet Burden of Proof

The plaintiff totally failed to meet the burden of proof in that it failed to show that there was any **lawful** judgment, order, mandate, writ, or process of court. The purported injunction, introduced over the objection of the defendant, was not shown to be **lawful.** As indicated above, contempt of court is not an ancillary or incidental suit but is an independent proceeding. In this contempt proceeding none of the formalities upon which the injunction may have been issued were shown. In essence, there is not a scintilla of evidence to show the injunction to be lawful.

Additionally, the record in this contempt proceeding is absolutely bare and without any proof whatsoever that the purported injunction was ever served on the defendant or that the defendant had actual or constructive knowledge at the time of the acts complained of in the Rule for Contempt. It is fundamental law and a requirement of due process of law under the Fourteenth Amendment of the United States Constitution, as well as the Louisiana

Constitution, that before a defendant can be held accountable for violation of a restraining order or injunction that he be given notice of the said injunction. Thus, proof of "notice" is an essential element in a contempt of court proceeding. In the instant contempt trial, not one shred of evidence was offered by plaintiff to show that defendant had notice of the said injunction.

Failure of Plaintiff to Show an Essential Element of Offense—That Defendants Were Not Licensed to Practice Medicine in the State of Louisiana:

Denial of Cross Examination or Right to Confront Witnesses

Louisiana Revised Statutes 37:1286 does not provide that a person may be enjoined indefinitely from practicing medicine but provides that an injunction may be obtained only "until such person obtains a certificate under the provisions of this part". The purported injunctions offered by plaintiff did not seek to enjoin defendants from practicing medicine indefinitely but only "until he (B. D. Mooring or E. J. Nosser) shall have first obtained the certificate or permit required by the Law of Louisiana:

Each Rule to Show Cause alleges as follows:

> "The defendant has never obtained the certificate or permit provided for under the provisions of the medical practice act, R.S. 37:1261, et seq. and, particularly, R.S. 37:1273, and is, therefore, without right to practice medicine in the State of Louisiana."

Thus, an essential element for plaintiff to prove under the Statute, the purported Judgments and the allegations of its Rules to Show Cause, is that the defendants in fact, have never obtained certificates or permits to practice medicine in the State of Louisiana. There was absolutely no legal or competent evidence of this fact in the contempt trial. In this regard, two matters of preliminary significance must be recognized. First, as indicated earlier, contempt of court is a separate proceeding and any proof offered in the original injunction proceeding cannot be considered. Secondly, any proof offered in the injunction proceeding is stale, untimely, and can in no manner show that the defendants were not, at any time of the acts alleged in the Rules, licensed to practice medicine in the State of Louisiana. The injunctions were issued in 1958.

No attempt was made to show that the defendants were not licensed to practice medicine in the State of Louisiana **except** by the admission, over defendant's timely objection, of certificates labeled P-16 and P-17 in the Mooring case and P-3 and P-4 in the Nosser case. Defendants, through counsel urged to the Court that the certificates were not competent evidence for the reason that defendants cannot be tried in a criminal proceeding by affidavit **in lieu of testimony**. Specifically, an essential element of an offense may not be proven solely by the unconfronted, ex parte affidavit of plaintiff shrouded by a veil which refuses to submit to the accuseds' constitutionally protected right of cross examination.

In *Pointer v. State of Texas*, 380 U.S. 400, 403, 85 S. Ct. 1065, 1086, 13 L. Ed. 2d 923 (1965) the United

States Supreme Court held that the Sixth Amendment right of an accused to confront the witness against him is a "fundamental right . . . made obligatory upon the States by the Fourteenth Amendment." Confrontation of a witness is equivalent to cross examination under oath in Court. The seriousness of such a denial was made clear by the United States Supreme Court recently wherein it stated, "a denial of cross examination without waiver . . . would be constitutional error of the first magnitude and no amount of showing of want or prejudice would cure it." *Brookhart v. Janis*, 384 U.S. 1, 3, 86 S. Ct. 1245, 1246, 16 L. Ed. 2d 314 (1966).

Trial of This Contempt Proceeding Without Jury Is Not Valid or Constitutional

Plaintiff, Louisiana State Board of Medical Examiners, contend that each defendant has violated an injunction and obtained a rule against each defendant to show cause why he should not be held in contempt of court. For the Louisiana State Board of Medical Examiners to prove defendants to have violated the injunction and be in contempt of court, it is necessary for them to prove, among other things, that the defendants violated Louisiana Revised Statutes 37:1270 as defined in Louisiana Revised Statutes 37:1261 and for which a penalty is fixed by Louisiana Revised Statutes 37:1289. Thus, defendants have been, in fact, tried for a misdemeanor and the proceedings herein are criminal proceedings.

Although these proceedings are captioned as a civil suit, such designation merely lingers as a result of the original civil injunction proceedings and presently serves only to veil the true nature of the present proceedings which is, in fact, prosecution of defendants subjecting

them to the peril of possible long imprisonment. The various rules filed by plaintiff seek only one thing, that defendants be adjudged in contempt of court. A natural and necessary consequence of such adjudication is the punishment for such contempt. Under Louisiana Revised Statutes 13:4611, the punishment for such contempt is fixed at a fine of not more than five hundred dollars, or by imprisonment for not more than six months, or both. At the time that the initial Rules to Show Cause or Contempt Proceedings were instituted against these defendants, Louisiana Revised Statutes 13:4611 provided the punishment for such contempt as a fine of not more than one thousand dollars, or by imprisonment of not more than twelve months, or both. Under this Statute and those pending rules for contempt, the presiding Judge and previously ordered that defendants be granted trial by Jury. The Louisiana State Board of Medical Examiners did not go forward with the pending rules until the Louisiana Legislature reduced the penalty under Louisiana Revised Statutes 13:4611.

Duncan v. Louisiana, 391 U.S. 145, 88 S. Ct. 1444 (1968), held that a defendant charged with a "serious" misdemeanor is entitled to trial by jury. *Bloom v. Illinois*, 391 U.S. 194, 88 S. Ct. 1477 (1968), and *Dyke v. Taylor Implement Manufacturing Company*, 391 U.S. 216, 88 S.Ct. 1472 (1968), held that the *Duncan* rule applied to a "serious" criminal contempt. The "criminal contempt" involved in *Dyke v. Taylor Implement Manufacturing Company* was the violation of a civil injunction in a labor dispute.

The *Duncan* case left some doubt as to whether its rule applied in a case involving a penalty of less than **two**

years imprisonment. This doubt was resolved by *Baldwin v. New York* involving a maximum possible sentence of one year in which the United States Supreme Court reversed a conviction without a jury and stated:

> "Where the accused cannot possibly face more than six months imprisonment, we have held that these disadvantages, onerous though they may be, may be outweighed by the benefits which result from speedy and inexpensive non-judiciary adjudications. We cannot, however, conclude that these administrative conveniences, in the light of the practices which now exist in every one of the fifty states as well as the federal courts, can similarly justify denying an accused the important right to trial by jury where the possible penalty exceeds six months imprisonment."

Thus, the *Duncan* rule of trial by jury, which is made applicable to contempts by *Bloom v. Illinois* and *Dyke v. Taylor Implement Manufacturing Company*, is applicable when the possible PENALTY EXCEEDS SIX MONTHS. The *Duncan* case has also been pretty much accepted for the proposition that where the penalty exceeds five hundred dollars a defendant is entitled to trial by jury. In the instant cases the penalties did exceed five hundred dollars for the reason that each defendant was sentenced to pay a fine of five hundred dollars PLUS SERVE AN ABSOLUTE JAIL TERM. B. D. Mooring was ordered to pay the five hundred dollar fine plus serve thirty (30) days in jail and E. J. Nosser was ordered to pay the five hundred dollar fine plus serve fifteen (15) days in jail. Thus, both sentences do exceed the payment of a five hundred dollar fine.

Acts and Conduct of Complainant are a Bar to Prosecution of Contempt Rule and Constitute Acquiescence in the Alleged Injunction Violation

Plaintiff is in court complaining of conduct which plaintiff, through its agents, directly brought about. The testimony of all of the witnesses shows that all of the evidence adduced by plaintiff is the result of plaintiff hiring various individuals through an agent for the express purpose of presenting themselves to defendants for at least the dual purpose of falsely misrepresenting to defendant various complaints and procuring defendants to do the very acts for which plaintiff now complains. In essence, plaintiff's witnesses were asked to manufacture complaints and lie to defendants in an attempt to obtain evidence about the very treatment that these witnesses—all agents of plaintiffs—affirmatively sought and requested. Significantly, the testimony disclosed that plaintiff's entire case and investigation consisted of these agents of plaintiff who were sent to defendants for the express purpose of requesting the acts to be performed of which plaintiff now complains.

The law is well stated in 43 C.J.S., *Injunctions*, Second 266 at Page 1026, as follows:

> "The acts or conduct of complainant may be such as to excuse a violation of an injunction granted to protect a private right, as, for example, where complainant has consented to, or acquiesced in, the violation; . . ."

> "Violation of an injunction granted to protect a private right may be excused by complainant's voluntary waiver of the right to have the injunction

> effective, and the party enjoined will not be punished in contempt proceedings for breach of the injunction when the breach was committed with the consent or acquiescence of complainant."

Additionally, it is stated at 17 C.J.S., Section 39, at Page 103:

> "As a rule, the fact that the contempt charge is the result of the direct of implied advice or consent of complainant is a sufficient justification therefore . . ." (of the conduct).

Of equal importance is the "clean hands" doctrine insofar as the same is applicable to plaintiff. For plaintiff to show a contempt of court, it would have to show, among other things, a violation of Louisiana Revised Statutes 37:1270, a misdemeanor under the laws of Louisiana. (L.R.S. 37:1289). The employees of plaintiff sent to defendant to procure violations of these statutes would be principles under Article 24 of the Criminal Code which provides:

> "All persons concerned in the commission of a crime, whether present or absent, and whether they directly commit the act constituting the offense, aid and abet in its commission, or directly or indirectly counsel or procure another to commit the crime, are principles."

It is a well known proposition of law that principles are equally guilty. Thus, we have a situation where plaintiff and its employees are, in fact, principles to the very conduct of which they complain and thus are in *pari delicto.*

It is respectfully submitted that the due process of law provision of the Fourteenth Amendment of the United States Constitution is violated when any governmental agency of the State, such as the Louisiana State Board of Medical Examiners in this case, procures a violation of some provision of law for the purpose of prosecuting the said violation. It is not the function of government to procure, cause, acquiesce in, entice or in any way encourage law violation. Due process of law requires by a governmental agent adherence to rather than violation of the rule of law.

Unauthorized Institution of Proceedings

The Rule to Show Cause was unauthorized both by law and by the Louisiana State Board of Medical Examiners for the following two, among other, reasons. Under Louisiana Revised Statutes, Title 37:1269, Sub-Paragraph B., it is provided that:

> "The board (Louisiana State Board of Medical Examiners) may: . . . (3) employ counsel to carry out the provisions of this part . . ."

There is absolutely no resolution, or extract of minutes offered in these proceedings showing that the Louisiana State Board of Medical Examiners employed either the trial counsel, Mr. Gordon E. Rountree, or the law firm of Cook, Clark, Egan, Yancy and King pursuant to the above cited Statute. In fact, the extract of minutes offered by plaintiff show to the contrary that a different law firm, Adam and Reese, were in some vague manner employed by plaintiff.

The Louisiana State Board of Medical Examiners does not have the right to delegate or authorize any person other than itself to engage counsel to represent the Louisiana State Board of Medical Examiners. The retention of an attorney is an essential function of the Louisiana State Board of Medical Examiners under R.S. 37:1269 and that function cannot be abrogated.

Of equal importance also is the fact that the extract of minutes filed in this proceeding do not authorize the President of the Louisiana State Board of Medical Examiners to seek a contempt citation against defendant but instead authorized him:

> "To institute an investigation of and prosecute legal proceedings against B. D. Mooring of Shreveport, Louisiana, **for the purpose of securing injunction or** appropriate action **against B. D. Mooring from practicing** medicine in the State of Louisiana."

The minutes of E. J. Nosser are essentially the same. Thus, the authorization granted by the Board to its President was not that of securing a contempt prosecution but that of securing an injunction.

CONCLUSION

It is respectfully submitted that trial without jury is invalid, in violation of defendants' constitutional rights, and will not support a finding of contempt of court. It is further submitted that plaintiff has failed to carry the burden of proof required in a contempt proceeding by the evidence adduced and, finally and alternatively, in any event, defendants are afforded a complete defense of

this prosecution because of the conduct of plaintiff in procuring the acts complained of.

Respectfully submitted,

CAMILLE F. GRAVEL, JR.,
611 Murray Street,
Alexandria, Louisiana 71301,
Attorney for Defendants-Petitioners.

BY .....
CAMILLE F. GRAVEL, JR.

CERTIFICATE

I certify that a copy of the foregoing application has been served upon the opposing counsel: Gordon E. Rountree, Attorney at Law for the Louisiana State Board of Medical Examiners, by placing the same in the United States Mail, properly addressed, with sufficient postage affixed thereto.

Alexandria, Louisiana, April ....., 1974.

CAMILLE F. GRAVEL, JR.

Exhibit "A"

Supreme Court of Louisiana

NEW ORLEANS, 70112

LOUISIANA STATE BOARD
OF MEDICAL EXAMINERS

January 25, 1974

V.

B. D. MOORING

NO. 54,253

- - - - -

In re: B. D. Mooring applying for Writs of Certiorari, (Review), Prohibition and Mandamus

- - - - -

Writ denied. Under the allegations made, no error of law or fact is shown in this contempt proceeding.

/s/ AT JR

/s/ JWS

/s/ FWS

/s/ MEB

/s/ WFM

/s/ PFC

DIXON, J., is of the opinion the writ should be granted.

A TRUE COPY
Clerk's Office
Supreme Court of Louisiana
New Orleans
January 25, 1974

/s/ Phil Trice
Deputy Clerk

THE COURT: This case came on for trial before the Court by the plaintiffs alleging that the defendants had failed to comply with prior orders of the Court reference the practice of chiropractic.

The Court is of the opinion that the plaintiff carried its burden in establishing that the defendant clearly had been practicing chiropractic in violation of prior Court order which enjoined him from doing so. Therefore, it is the order of the Court that the defendant be found in contempt of Court for his actions.

In line with prior communications which the Court has received from Counsel for the defendant the Court is going to defer sentence in this matter until the 30th of July, 1973. The Court has been informed that the defendant's intention shall be to appeal any ruling adverse to his position. This will give the defendant ample opportunity to begin any appeal proceedings which he might desire which might entitle him to suspension of any sentence pending the outcome of any appeal to a higher Court.

STATE OF LOUISIANA
PARISH OF CADDO

I HEREBY CERTIFY that the foregoing is a true and correct transcription of the proceedings had in the above matter.

SHREVEPORT, LOUISIANA, July 2, 1973

Mrs. Opal Cain Goodgion

Mrs. Opal Cain Goodgion, Official Court Reporter

Exhibit "B"

Supreme Court of Louisiana

NEW ORLEANS, 70112

LOUISIANA STATE BOARD OF MEDICAL EXAMINERS January 25, 1974

V.

No. 54,252

E. J. NOSSER

- - - - -

In re: E. J. Nosser, applying for writs of certiorari, or review, prohibition and mandamus.

- - - - -

Writ denied. Under allegations made, no error of law or fact is shown in this contempt proceeding.

/s/ AT Jr.

/s/ JWS

/s/ FWS

/s/ MEB

/s/ WFM

/s/ PFC

DIXON, J., is of opinion the writ should be granted.

A TRUE COPY
Clerk's Office
Supreme Court of Louisiana
New Orleans
January 25, 1974

/s/ Phil Trice
Deputy Clerk

THE COURT: This matter was tried on the same day as the Mooring case. The Court's conclusions and results are no different.

The Court feels that the plaintiff proved and carried its necessary burden of proof in establishing that the defendant had, in fact, been practicing chiropractic in violation of prior orders of this Court enjoining him from such activities.

Let there be judgment casting the defendant in contempt of Court.

I am going to also defer sentencing in this matter until the 30th day of July for like reasons reference the Mooring case.

STATE OF LOUISIANA
PARISH OF CADDO

I HEREBY CERTIFY that the foregoing is a true and correct transcription of the proceedings had in the above matter.

SHREVEPORT, LOUISIANA, July 2, 1973

Mrs. Opal Cain Goodgion

Mrs. Opal Cain Goodgion, Official Court Reporter

Exhibit "C"

Supreme Court of Louisiana

NEW ORLEANS, 70112

LOUISIANA STATE BOARD OF MEDICAL EXAMINERS — September 21, 1973

V.

B. D. MOORING — No. 53,909

- - - - -

In re: B. D. Mooring applying for writs of certiorari (review), prohibition and mandamus.

- - - - -

Application not considered. There is no final judgment or sentence, and we will not review a case so postured.

/s/ MEB

/s/ JWS

/s/ FWS

/s/ AT Jr.

/s/ JAD

/s/ PFC

/s/ WFM

A TRUE COPY
Clerk's Office
Supreme Court of Louisiana
New Orleans
September 21, 1973

/s/ Phil Trice
Deputy Clerk

Exhibit "O"

Supreme Court of Louisiana

NEW ORLEANS, 70112

LOUISIANA STATE BOARD OF MEDICAL EXAMINERS — September 21, 1973

V.

E. J. NOSSER — No. 53,910

- - - - -

In re: E. J. Nosser applying for writs of certiorari (review), prohibition, and mandamus.

- - - - -

Application not considered: There is no final judgment, or sentence, and we will not review a case so postured.

/s/ AT jr.

/s/ JWS

/s/ FWS

/s/ MEB

/s/ JAD

/s/ PFC

/s/ WFM

A TRUE COPY
Clerk's Office
Supreme Court of Louisiana
New Orleans
September 21, 1973

/s/ Phil Trice
Deputy Clerk

COURT OF APPEAL

Second Circuit

State of Louisiana

Exhibit "E"

No. 12,200

August 1, 1973.

On application of B. D. Mooring for writs of certiorari, prohibition and mandamus to the First Judicial District Court, in and for the Parish of Caddo, State of Louisiana, Hon. John F. Fant, Judge.

LOUISIANA STATE BOARD OF MEDICAL EXAMINERS

VERSUS

B. D. MOORING

WRITS DENIED.

This Court is without jurisdiction. (See Joint Legislative Committee of Legislature v Strain, 268 So.2d 629; State Board of Medical Examiners v Bates, 249 So. 2d 127; State Board of Medical Examiners v Doty, 258 So. 2d 639.)

Exhibit "F"

COURT OF APPEAL

Second Circuit

State of Louisiana

No. 12,253

No. 12,253

On application of B. D. Mooring for writ of certiorari to the First Judicial District Court, in and for the Parish of Caddo, State of Louisiana, Hon. John F. Fant, Judge.

LOUISIANA STATE BOARD OF MEDICAL EXAMINERS

VERSUS

B. D. MOORING

WRIT DENIED.

This court is of the opinion it has supervisory jurisdiction in this contempt proceeding arising out of a civil case in which an appeal would lie to the Court of Appeal. Art. 7, Sec. 29, La. Const. The application has been considered but is denied for the reason that on the showing made there does not appear to be any error of law in the proceedings or judgment complained of.

SECOND CIRCUIT COURT OF APPEAL
STATE OF LOUISIANA
Endorsed Filed NOV. 20 1973
HAROLD L. BOOTH
CLERK
A TRUE COPY — Attest
By
Clerk

11

Exhibit "G"

COURT OF APPEAL

Second Circuit

State of Louisiana

No. 12,201

August 1, 1973.

On application of E. J. Nosser for writs of certiorari, prohibition and mandamus to the First Judicial District Court, in and for the Parish of Caddo, State of Louisiana, Hon. John F. Fant, Judge.

LOUISIANA STATE BOARD OF MEDICAL EXAMINERS

VERSUS

E. J. NOSSER

WRITS DENIED.

This Court is without jurisdiction. (See Joint Legislative Committee of Legislature v Strain, 268 So. 2d 629; State Board of Medical Examiners v Bates, 249 So. 2d 127; State Board of Medical Examiners v Doty, 258 So. 2d 639.)

COURT OF APPEAL

Second Circuit

State of Louisiana

Exhibit "H"

No. 12,252

No. 12,252

On application of E. J. Nosser for writ of certiorari to the First Judicial District Court, in and for the Parish of Caddo, State of Louisiana, Hon. John F. Fant, Judge.

LOUISIANA STATE BOARD OF MEDICAL EXAMINERS

VERSUS

E. J. NOSSER

WRIT DENIED.

This court is of the opinion it has supervisory jurisdiction in this contempt proceeding arising out of a civil case in which an appeal would lie to the Court of Appeal. Art. 7, Sec. 29, La. Const. The application has been considered but is denied for the reason that on the showing made there does not appear to be any error of law in the proceedings or judgment complained of.

Exhibit "I"

IN THE FIRST JUDICIAL DISTRICT COURT

CADDO PARISH, LOUISIANA

LOUISIANA STATE BOARD OF MEDICAL EXAMINERS

VERSUS NO. 122,682

B. D. MOORING

OPINION

in the above matter rendered by His Honor, John F. Pant, Judge of the First Judicial District Court, in and for the Parish of Caddo, State of Louisiana, on June 29, 1973.

Exhibit "J"

LOUISIANA STATE BOARD OF MEDICAL EXAMINERS	*	NUMBER 122,682
VERSUS	*	FIRST JUDICIAL DISTRICT COURT
B. D. MOORING	*	CADDO PARISH LOUISIANA

* * * *

JUDGMENT ON RULE

This matter coming before the Court on a rule for contempt of Court filed on April 26, 1973, the rule being tried on June 12, 1973, and, after consideration of the law and evidence,

IT IS ORDERED, ADJUDGED AND DECREED that the said rule be made absolute, adjudging the said B. D. Mooring, defendant in rule, to be in contempt of the authority and judgment of this Court for his violation of the injunction previously rendered in these proceedings.

Accordingly, the following sentence is imposed: B. D. Mooring is ordered to pay a fine of Five Hundred and no/100 ($500.00) Dollars or be imprisoned for thirty (30) days, and, B. D. Mooring is to be imprisoned for thirty (30) days.

JUDGMENT RENDERED on June 29, 1973 and sentence imposed on October 18, 1973.

JUDGMENT READ AND SIGNED, in Shreveport, Louisiana, on this 20 day of October, 1973.

John Z Ford

DISTRICT JUDGE

Exhibit "K"

IN THE FIRST JUDICIAL DISTRICT COURT

CADDO PARISH, LOUISIANA

LOUISIANA STATE BOARD OF MEDICAL EXAMINERS

VERSUS NO. 132,517

E. J. NOSSER

OPINION

in the above matter rendered by His Honor, John F. Pant, Judge of the First Judicial District Court, in and for the Parish of Caddo, State of Louisiana, on June 29, 1973.

Reported by:

Mrs. Opal Cain Goodgion,

Official Court Reporter

EXHIBIT "L"

FILED

OCT 29 1973

Deputy Clerk

Exhibit "L"

LOUISIANA STATE BOARD OF MEDICAL EXAMINERS	X	NUMBER 132,517
VERSUS	X	FIRST JUDICIAL DISTRICT COURT
E. J. NOSSER	X	CADDO PARISH, LOUISIANA

* * * * *

JUDGMENT ON RULE

This matter coming before the Court on a rule for contempt of Court filed on April 26, 1973, the rule being tried on June 12, 1973, and, after consideration of the law and evidence,

IT IS ORDERED, ADJUDGED AND DECREED that the said rule be made absolute, adjudging the said E. J. Nosser, defendant in rule, to be in contempt of the authority and judgment of this Court for his violation of the injunction previously rendered in these proceedings.

Accordingly, the following sentence is imposed: E. J. Nosser is ordered to pay a fine of Five Hundred and no/100 ($500.00) Dollars or be imprisoned for thirty (30) days, and, E. J. Nosser is to be imprisoned for fifteen (15) days.

JUDGMENT RENDERED on June 29, 1973 and sentence imposed on October 18, 1973.

JUDGMENT READ AND SIGNED, in Shreveport, Louisiana, on this 29 day of October, 1973.

John S. Hunt

DISTRICT JUDGE

Exhibit "M"

LOUISIANA STATE BOARD OF MEDICAL EXAMINERS

VS.

B. D. MOORING, JR.

NUMBER 122,682

FIRST JUDICIAL DISTRICT COURT

CADDO PARISH, LOUISIANA

MINUTES OF THE COURT

Feb. 13, 1974 Defendant now comes for sentence. The Court ordered the imposition of sentence stayed for a period of 90 days to allow Defendant to apply for writs to the U. S. Supreme Court. (Judge John F. Fant)

I HEREBY CERTIFY that the above and foregoing is a true and correct copy of the Minutes of the First Judicial District Court in Suit #122,682 for February 13, 1974.

GIVEN UNDER MY HAND AND SEAL OF OFFICE at the City of Shreveport, Caddo Parish, Louisiana, on this the 21st day of February, 1974.

Helen H. Smith
DEPUTY CLERK

Exhibit "N"

LOUISIANA STATE BOARD OF MEDICAL EXAMINERS

VS.

B. D. MOORING, JR.

NUMBER 132,517

FIRST JUDICIAL DISTRICT COURT

CADDO PARISH, LOUISIANA

MINUTES OF THE COURT

Feb. 13, 1974 Defendant now comes for sentence. The Court ordered the imposition of sentence stayed for a period of 90 days to allow Defendant to apply for writs to the U. S. Supreme Court. (Judge John F. Fant)

I HEREBY CERTIFY that the above and foregoing is a true and correct copy of the Minutes of the First Judicial District Court in Suit #132,517 for February 13, 1974.

GIVEN UNDER MY HAND AND SEAL OF OFFICE at the City of Shreveport, Caddo Parish, Louisiana, on this the 21st day of February, 1974.

Helen H. Smith
DEPUTY CLERK

Exhibit "O"

Supreme Court of the United States

No. A-1014

B. D. MOORING and E. J. NOSSER,

Petitioners

v.

LOUISIANA STATE BOARD of MEDICAL EXAMINERS

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 9, 1974.

/s/ Lewis F. Powell, Jr.

Associate Justice of the Supreme Court of the United States

Dated this 25th

day of APRIL, 1974.

INDEX

	Page
STATEMENT OF THE CASE	1
REASONS FOR DENY THE WRIT	3
CONCLUSION	9
CERTIFICATE	11

TABLE OF AUTHORITIES

Page

Louisiana Statutes:

R.S. 37:1261-1290 3

R.S. 13:4611(a)(2) 5

R.S. 37:1269 6

R.S. 37:1282 8

Cases:

Duncan vs. Louisiana, 291 U.S. 145 4

Baldwin vs. New York, 90 S. Ct. 1866 4

Louisiana Board of Medical Examiners vs. Bates,
258 La. 1049, 249 So. 2nd 127 (1971) 4

IN THE

Supreme Court of the United States

No. 73-1683

LOUISIANA STATE BOARD
OF MEDICAL EXAMINERS

Plaintiff

vs.

B. D. MOORING

Defendant-Petitioner

and

LOUISIANA STATE BOARD
OF MEDICAL EXAMINERS

Plaintiff

vs.

E. J. NOSSER

Defendant-Petitioner

RESPONSE BY LOUISIANA STATE BOARD OF MEDICAL EXAMINERS TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA FILED BY B. D. MOORING AND E. J. NOSSER

MAY IT PLEASE THE COURT:

— STATEMENT OF THE CASE —

In 1955 and 1958 respectively, B. D. Mooring and E. J. Nosser, chiropractors, were enjoined from the practice of medicine in the State of Louisiana pursuant to the Louisiana Medical Practice Act by the First Judicial District Court, Caddo Parish, Louisiana. Since that time, Mooring and Nosser have continued

to practice medicine in the State of Louisiana, thereby flagrantly and openly defying the Orders of the First Judicial District Court. In April of 1973, the Louisiana State Board of Medical Examiners filed contempt rules against Mooring and Nosser. The cases were tried and Mooring and Nosser were both adjudged to be in contempt of Court for failing to comply with the injunctions.

Nosser and Mooring applied for Writs to the Second Circuit Court of Appeal in the State of Louisiana which were denied on two occasions and also applied for Writs to the Louisiana Supreme Court, which Writs were also denied.

At this point, we feel that a short sketch of the background of this situation would be beneficial to the Court. The State of Louisiana was for quite a long time the only State which would not allow the licensing of chiropractors. The policy of the State of Louisiana was that the chiropractors, if licensed, could not be effectively restricted to the practice of chiropractic, but would continue to practice medicine on a full scale basis.

As this Honorable Court is probably aware, the basic tenet of the chiropractic philosophy is that there is one cause and one cure for all diseases known to man. The cause is subluxations of the vertebra and the cure is the manipulation or "popping" of the back and neck. In other words, subluxations or slight misalignment of the vertebra causes heart disease, cancer, pimples, acne, and any and all other diseases known to man. The simple cure is a manipulation or "popping" of the back and neck. Thus, the State of Louisiana felt that it would be virtually impossible to restrict the chiropractors to treatment within their field and commensurate with their training. Therefore, the State of Louisiana, for years, refused to license chiropractors in any way, shape or form. However, in the last session of the Louisiana Legislature, in the summer of

1974, the political climate changed and the Louisiana Legislature for the first time licensed chiropractors.

Plaintiff in these actions is the Louisiana State Board of Medical Examiners. The Board is a state agency created by legislative act and the Board is charged with the duty of enforcing the Louisiana Medical Practice Act. (La. R.S. 37:1261-1290). In view of the fact that the chiropractors have now been licensed in Louisiana, the Board does not want to appear vindictive by virtue of the fact that we are continuing with these proceedings. Nosser and Mooring committed the acts resulting in the contempt of Court convictions prior to the time they were licensed. They were also convicted of contempt of Court prior to the time they were licensed. Thus, in view of the fact that these cases have been going on for as long as they have and in view of the fact that the issue is the enforcement of a *Contempt of Court Order* secured prior to licensing of the chiropractors, the Louisiana State Board of Medical Examiners feels that it has no choice but to continue with these cases to conclusion, especially in view of the request by this Honorable Court that we file a reply brief. Therefore, we are filing this brief in opposition to the petition for the writ and we are hereby asking, urging and requesting this Honorable Court to deny the writ application of Nosser and Mooring for the reasons set forth below.

— REASONS FOR DENYING THE WRIT —

Nosser's and Mooring's Contention That They Were Entitled to a Trial by Jury

At the outset, we will address ourselves to what purports to be the primary reason or ground for Nosser and Mooring applying to this Honorable Court for relief, that being the contention that they were entitled to a jury trial on the contempt rule. Nosser and Mooring have made this their primary contention all the way through these proceedings and are still

contending that they were entitled to a jury trial on the contempt rule. We feel that all of the various and sundry objections raised by Nosser and Mooring are frivolous and that they are simply "grasping at straws". However, we will address ourselves at the outset to the issue of the denial of the jury trial which is the only constitutional issue raised.

As the record shows, Mooring and Nosser were enjoined from the practice of medicine in the State of Louisiana by the First Judicial District Court in 1955 and 1958, respectively. On May 20, 1968, this Honorable Court decided the case of *Duncan vs. Louisiana*, 291 U.S. 145. In *Duncan*, the defendant was accused of simple assault which carried a possible two year prison sentence. This Court discussed the issue of when an accused would be entitled to a jury trial and held that a jury trial should be granted in all "serious" crimes, but did not draw the line between "serious" and "petty" crimes. This Court held that a possible two year prison sentence was a "serious" crime and therefore the defendant was entitled to a jury trial.

Approximately two years later, on June 22, 1970, this Honorable Court, in *Baldwin vs. New York*, 90 S. Ct. 1866, drew the line between "serious" and "petty" offenses for the purpose of determining when a defendant was entitled to a jury trial. In *Baldwin*, the punishment was a possible one year sentence. This Court held that any crime which called for punishment of more than six months imprisonment amounted to a "serious" crime with the defendant being entitled to a jury trial. Any crime with a punishment of six months or less was a "petty" crime and the defendant was not entitled to a jury trial.

Following *Baldwin*, the Louisiana Supreme Court decided the case of *Louisiana State Board of Medical Examiners vs. Bates*, 258 La. 1049, 249 So. 2nd 127 (1971). Bates was

a chiropractor practicing in Rapides Parish. He had been enjoined in 1958 and the Board of Medical Examiners moved for contempt in 1968. Bates moved for a jury trial on the contempt hearing, which motion was denied. Bates was tried and found guilty of contempt for violating the injunction. He applied for writs, which writs were granted by the Louisiana Supreme Court. The Louisiana Supreme Court then held that Bates was entitled to a jury trial on the contempt citation because of the fact that the contempt punishment statute, R.S. 13:4611(a)(2), provided for a possible one year prison sentence and a possible $1,000.00 fine. The Court concluded that since 13:4611(a)(2) called for more than a six months prison sentence, that Bates was entitled to a jury trial.

In view of the *Baldwin* decision, the Louisiana Legislature, upon recommendation of the Law Institute, amended 13:4611(a)(2) and reduced the penalty for contempt from the one year maximum prison sentence or $1,000.00 fine to not more than six months in prison or $500.00 fine, or both. This amendment reducing the penalty was effective on July 12, 1972.

From the above, it is clear that a defendant in a contempt rule will be tried by a judge and not a jury if the allegations or alleged acts of contempt occurred after the effective date of the amendment of 13:4611(a)(2), July 12, 1972.

As demonstrated by the evidence in this matter, the acts committed by Mooring and Nosser which resulted in the contempt judgment all took place after July 12, 1972, the effective date of the amendment of 13:4611(a)(2). Thus, there is no question but that Mooring and Nosser were not entitled to a jury trial, but a trial by judge, which is what they received.

Mooring and Nosser are apparently contending that they should be entitled to a trial by jury because in a contempt rule filed in 1969 the Trial Court ordered a trial by jury. We have

no quarrel with the Trial Court's ruling on the 1969 contempt rule. However, the contempt rules at issue here were filed in April of 1973, and all of the evidence presented which resulted in the contempt judgment dealt with Mooring's and Nosser's activities subsequent to July 12, 1972. Thus, as stated above, Mooring and Nosser were not entitled to a jury trial.

Discussion of Other Issues Raised By Nosser and Mooring

As stated above, we feel that none of the issues discussed in the brief of Nosser and Mooring have any merit whatsoever and other than the jury trial issue, there are no constitutional issues involved. However, in view of the fact that the issues have been raised by the chiropractors in their brief, we will briefly discuss each issue.

The chiropractors complain that the Louisiana State Board of Medical Examiners did not authorize counsel or counsel's law firm to initiate the proceedings. Quite obviously, the chiropractors and their counsel cannot seriously contend that counsel would file these proceedings without being retained and authorized to do so by its client, Louisiana State Board of Medical Examiners. La. R.S. 37:1269 clearly provides that the Board of Medical Examiners may employ counsel to carry out the provisions of the Louisiana Medical Practice Act. The Minutes are all in the record of the proceedings and clearly authorize the institution of these proceedings by counsel and counsel's law firm. In particular, the Minutes in the record of these proceedings reflect that the Board employed the law firm of Adams & Reese in connection with these proceedings and further gave Adams & Reese the authority to associate local counsel. The firm of Adams & Reese is situated in New Orleans, Louisiana, and Adams & Reese are the statewide counsel for the Louisiana Board of Medical Examiners. Adams & Reese followed the practice of associating local counsel in

each particular area to represent the Board. The law firm of Cook, Clark, Egan, Yancey & King was associated by Adams & Reese to handle this litigation. In fact, when the contempt rules were filed herein, they were filed in the name of Adams & Reese and local counsel in Shreveport, Louisiana, being the firm of Cook, Clark, Egan, Yancey & King, all as is set forth in the petitions for contempt of Court.

Nosser and Mooring also complained that the conduct which resulted in the contempt convictions of Nosser and Mooring was directly brought about by the plaintiff and its agents due to the fact that the plaintiff's witnesses went in for treatment by Nosser and Mooring. Of course, this argument is ludicrous, to say the least. Nosser and Mooring have been flagrantly and openly practicing medicine in the State of Louisiana for years, i.e., that they have practiced medicine before the injunctions in 1955 and 1958 and continually since that time. As all of the evidence shows in the contempt trials, Nosser and Mooring held themselves out to the public as chiropractors and further held themselves out to the public as being able to diagnose and cure any and all types of diseases, including cancer, heart disease, etc. They put their names in the phone book, they had signs in front of their office, they had brochures in their office, etc. All of this is in evidence and it was conclusively proven at the trials that they were holding themselves out to the public as being able to diagnose and cure the diseases of man. Clearly, the Louisiana State Board of Medical Examiners did not induce them to practice medicine in the State of Louisiana. It was of their own volition.

The chiropractors also complained that they were denied the right of confrontation of witnesses and the right to cross examine witnesses. They contend that Louisiana State Board of Medical Examiners introduced into evidence an affidavit and certificate that Nosser and Mooring were not licensed to practice medicine in the State of Louisiana over and above

their objections. Of course, if Nosser and Mooring were licensed physicians in the State of Louisiana, we would not be involved in this litigation. At the contempt rules, in view of the possibility that the contempt rules would be considered criminal proceedings, the plaintiff was not in a position to call Nosser and Mooring on cross examination to solicit an admission from Nosser and Mooring that they were not licensed to practice medicine in Louisiana. Obviously, if they had been licensed, they would have taken the stand and said so. However, plaintiff introduced into evidence a certificate and affidavit from the duly authorized Secretary of the Louisiana Board of Medical Examiners, which is a state agency in the State of Louisiana, certifying that Nosser and Mooring were not on the rolls as licensed to practice medicine. Clearly, the Secretary of the Louisiana State Board of Medical Examiners could have been called as a witness on cross examination by Nosser and Mooring if they so desired. Additionally, R.S. 37:1282, which is a section of the Louisiana Medical Practice Act, provides that the Board of Medical Examiners shall publish annually the list of names of those individuals who hold certificates to practice medicine in the State of Louisiana and that this list shall be received in evidence by Courts as proof that the individuals are duly certified. It is clear to us that a certificate from the duly authorized Secretary of this state agency, the Louisiana Board of Medical Examiners, to the effect that an individual is not on the certified and published list is clearly within the scope and purview of this Statute and clearly admissible as proper evidence in a court of law.

Finally, the chiropractors complained that the Louisiana Board of Medical Examiners did not allege that the injunctions obtained against Nosser and Mooring were "lawful" and that the Board did not prove that these injunctions were lawful injunctions. Like the other complaints of the chiropractors, this allegation also has no substance whatsoever.

Clearly, as shown in our petitions for contempt of Court, the specific allegations were made that the injunctions previously obtained were lawful. Furthermore, there was never a reversal by a higher court of these injunctions which conclusively establishes that they were lawful. More significantly, we take this opportunity to quote from the transcript in the Nosser injunction trial which was held on January 7, 1958, wherein at page 74 of the transcript, at the conclusion of the taking of the testimony, the Trial Judge stated as follows:

> "The Court is firmly convinced that the plaintiff has proved its case, not only by a preponderance of the evidence, but beyond, not only any reasonable doubt, *but any doubt at all.* There is no doubt in my mind whatsoever."

The chiropractors also complained that they were never notified and that we did not establish that proper notice was given to them of the injunction proceedings, etc. Of course, the injunction proceedings which bear the same suit numbers as the contempt proceedings clearly reflect that service of process on the chiropractors was properly made. Furthermore, as the transcripts in the injunction trials demonstrate, Nosser and Mooring were physically present at the injunction trials, represented by counsel, and actually testified in the cases.

CONCLUSION

It is respectfully submitted that the only constitutional issue raised by the chiropractors was the claim that they were denied a jury trial. It is crystal clear that they were not entitled to a jury trial. In view of the fact that the maximum possible punishment under Louisiana law was no more than six months imprisonment for contempt of Court, the chiropractors were tried by judge as they should have been.

These cases get down to the issue of whether a Trial Court will be able to lawfully enforce its own Orders. These

are contempt of Court proceedings. It was conclusively established at the contempt of Court trials that Nosser and Mooring had flagrantly and deliberately disobeyed and not complied with the prior injunctions entered against them. The Trial Court found them to be in contempt of Court. It is respectfully submitted that the Trial Court's contempt rulings be upheld and that the writ applications of Nosser and Mooring be denied.

Respectfully submitted,

COOK, CLARK, EGAN, YANCEY & KING

By s/ Gordon E. Rountree
Gordon E. Rountree

600 Commercial National Bank Building
Post Office Box 77
Shreveport, Louisiana 71161

CERTIFICATE

I HEREBY CERTIFY that a copy of the above and foregoing Brief has been mailed, proper postage affixed, to Camille F. Gravel, Jr., Esquire, at 611 Murray Street, Alexandria, Louisiana 71301, attorney for defendants-petitioners.

Shreveport, Louisiana, this 15th day of October, 1974.

s/ Gordon E. Rountree
OF COUNSEL